IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 208

GLADYS HILDRETH,
Petitioner,

vs.

UNION NEWS COMPANY, a New York corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Gladys Hildreth, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on April 12, 1963.

OPINIONS BELOW

The judgment of the district court (11a-22a) granting defendant's motion for a directed verdict of no cause of action is unreported. The opinion of the Court of Appeals is reported in 315 F. 2d 548 (1963), and a copy is appended hereto (Appendix A, 1a).

The opinion of the Court of Appeals, on the first appeal, is reported in 295 F. 2d 658 (1961), and a copy is appended hereto (Appendix A, 4a). Order on petition for rehearing entered November 9, 1961.

JURISDICTION

The judgment of the Court of Appeals is dated April 12, 1963 and was entered on the same date. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

I. Is a litigant deprived of Constitutional rights to trial by jury and due process of law, by the action of a Court of Appeals in setting aside a verdict and judgment in favor of such litigant, and ordering a new trial, where the appellate court's conclusions of law are based on findings of fact contrary to all the evidence?

II. On retrial, is the doctrine of the law of the case applicable where the opinion of the Court of Appeals is entirely based on claims not advanced by either of the parties and important findings of fact by it which are contrary to the admitted and undisputed facts before the jury in both trials?

III. Did the Court of Appeals err in holding that there was "no evidence from which a jury could find that in agreeing to lay off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the union's and defendant's agents"?

IV. Where a union makes a secret agreement with an employer that it will not object if the employer discharges five employees without justification, although the existing collective bargaining agreement provides employees may not be discharged without just cause, and after the discharges refuses to either inform the employees of the reasons therefore or to require the employer to do so, refuses without explanation to process a grievance in behalf of such employees, fails to follow up with the employer to determine whether conditions which might lead to reinstatement of the employees exist and participates in a sham hearing with reference to the discharge, did the Court of Appeals err in holding that what was done by the union and defendant after plaintiff's discharge could not

be relied upon as evidence of fraud, bad faith or collusion in the prior agreement to terminate plaintiff's employment?

V. Does a union have the power, under guise of interpreting or modifying an existing collective bargaining agreement, to destroy an employee's right not to be discharged excepting for just cause?

VI. Where, according to the terms of the collective bargaining agreement, the contractual remedies for the adjustment of grievances may be invoked only by the union, is a wrongfully discharged employee entitled to personally present a grievance over such discharge to the company; and, if not, is failure of the union to exhaust contractual remedies a defense to a civil action for damages?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VII — CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. (U. S. C. A., *Constitution*, p. 134).

STATUTES INVOLVED

Labor-Management Relations Act of 1947, as amended:

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

. . . .

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives

of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *" 61 *Stat.*, 140, 143, 29 U. S. C. (Supp. V) Secs. 157, 159 (a).

STATEMENT

Jurisdiction of the trial court is based on diversity of citizenship. The action was brought to recover damages for violation of seniority rights and for wrongful discharge in breach of the provisions of a collective bargaining agreement (6a-7a). By way of defense, defendant advanced the claims that: (1) plaintiff failed to exhaust the grievance procedure provided by the collective bargaining agreement; (2) that plaintiff was, personally or as a member of a crew, guilty of carelessness, inefficiency or malfeasance, which resulted in financial loss to defendant; (3) that plaintiff's collective bargaining agent acquiesced in her discharge; and (4) that plaintiff failed to mitigate damages (9a-10a). The case was tried to a jury in January, 1960. A motion for a directed verdict was made by the defendant at the close of the proofs, which was denied. The jury returned a verdict of $5,000.00 in favor of the plaintiff and against the defendant and judgment was entered thereon on January 28, 1960. No motion for judgment n.o.v. or for a new trial was made after entry of judgment. An appeal was taken to the Court of Appeals for the Sixth Circuit, *which re-examined and re-decided the facts* and, on the basis of such decision, directed entry of judgment for defendant. Following the filing of a petition for rehearing, the Court of Appeals for the Sixth Circuit remanded the case for a new trial, citing *Cone vs. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 91 L. Ed. 849.

Upon retrial of the cause certain evidence, additional to that adduced at the first trial, was introduced. Nonetheless, the trial court held that the evidence introduced was substantially the same as that offered on the first trial of the cause and, this being so, it was bound by the determination of the Court of Appeals that there was no evidence to go to the jury on the issue of fraud, bad faith, or collusion between the union and the defendant (16a); that the union

had the power to waive plaintiff's right not to be discharged except for just cause (17a); and that under this collective bargaining agreement the plaintiff had no right to present and process a grievance protesting her discharge, this right being exclusively reserved to the union (19a-20a).

The evidence in this case is largely undisputed and such minor variations as exist are basically immaterial. Plaintiff commenced work as a counter girl, at a soda fountain operated by defendant at the Michigan Central Depot in Detroit, in September, 1948 and continued in such employment until March 11, 1958. During the period of her employment, she was a member of the Hotel & Restaurant Workers union and various collective bargaining agreements were in effect between said union and defendant — the relevant one being dated October 15, 1957. This contract recognized the seniority rights of employees and provided an employee should not be discharged except for just cause (94a).

In the late spring of 1957, George Hloros was named manager of the soda fountain, bar and restaurant at the Depot by the Union News Company. Although no complaints were made by corporate headquarters (72a), Hloros and his immediate supervisor, Carl Omar, decided the cost of food in relation to sales was too high and, around May or June of 1957, began complaining to the union representative about it; and asking that the union approve a change of crew as a solution to their problem (34a). The union refused to accede to this request at first. The theory behind the request was that the counter employees were either embezzling cash, failing to charge proper prices particularly to friends, giving too large portions of food or otherwise mishandling food or money (42a).

Conversations about the "bad operation" continued between the company and the union until about February, 1958, when the company claimed they had a particularly bad showing and offered to open their books to the union to prove it. The union looked at the books, or at least at the company's Form 292 (a sample sheet of which appears as Exhibit A, 98a) and agreed that it showed a high ratio of food costs to sales. There is no question but that these reports were made out monthly during 1957 and 1958, and

the figures therefrom which the company claims are relevant are summarized on pages 101a through 104a, showing a range of percentage of food costs to sales of from 34.09 per cent for December, 1958 to 44.73 per cent for May, 1957. Plaintiff does not question the accuracy of any of the books submitted but objected to their admission on the ground that they were conclusions, being summaries and the underlying records not produced for examination (36a); on the ground of relevancy (38a); on the ground that the form 133 (97a) was hearsay, being merely the record of a transaction with a third party (39a); and because they included figures for the small soda fountain, whereas plaintiff was employed only at the large fountain (39a, 41a). The court overruled these objections and admitted them.

At the end of February, or the first of March, 1958, the union entered into an agreement with the company that the company could lay off five of the ten counter employees. Which ones were to be laid off was left entirely up to the company, and the union never tried to learn why the company picked the five it did. Following the lay-off, if the company's figures did not improve within the next two weeks, the employees were to be rehired and paid their two weeks wages (35a).

At the time of making this agreement, both the company and the union were aware that the counter employees might not be the source of the alleged difficulty. It could have been due to theft by any of the other employees connected with the operation. The office girl could have been embezzling funds after they were turned in from the counter cash registers (76a; 78a); there could have been pilferage from the stockroom (62a; 92a); or the apparent loss of profits might have been due to an increase in the cost of merchandise with no corresponding increase in selling price. The company knew that a variation in the percentage figures over a two week period has no significance (67a). Both the company and the union knew that, if any of the counter employees were guilty of carelessness or inefficiency which brought about an unprofitable operation, or indicated a failure to account for all receipts, waste of food or improper handling of food, such conduct could be readily observed and a detective (or any stranger) could

easily point out the culprit (63a; 72a-73a; 85a). In the summer of 1957, a fountain girl was discharged for not ringing up sales, when a cab driver reported to Hloros that she was failing to do so, and a check of her register showed he was right (79a). When the union suggested to the company that it use spotters to find out whether any counter employees were guilty of such conduct, the company claimed it was not its policy to do so (72a, 85a), this suggestion having been made before the discharge of plaintiff (63a). By using sales checks, the company could locate the source of its trouble (63a; 71a; 85a). With reference to whether the union acted in bad faith, collusively or arbitrarily in acquiescing in the discharge of the five employees, plaintiff showed that the union never told any of the employees of the complaints by the company during 1957 and 1958, or its demand that the union agree to the discharge of all the counter employees (57a); nor did the union insist that the company inform them of its complaints (57a; 60a-61a). The union did not insist that the company take any of the steps it could have, to correct the situation or place the blame for it, instead of discharging plaintiff and the other four (63a). Finally, the plaintiff testified that she never knew, until the first trial of the cause, what the company claimed as the reason for the discharges (23a-27a); and the union was unable to recall notifying the women of the reason or insisting that the company do so (58a-62a).[1]

Plaintiff was told at first that she was being laid off. She found out, the following Monday, that she was being replaced and promptly went to her union to seek its assistance in filing and processing a grievance. She talked to Wirtz, the union representative, who told her he didn't have time

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[1] The importance of the facts stated in this paragraph cannot be overemphasized. They are largely based on defendant's own testimony and wholly uncontradicated but they are diametrically opposed to the findings of fact made by the Court of Appeals on which it based its opinions. See 295 F. 2d p. 660, second column; p. 663, first column. 315 F. 2d p. 550, first column.

to be bothered, according to plaintiff's testimony (25a-26a), and he turned her over to his superior, Mr. Carruthers, according to Wirtz' testimony (65a). Carruthers arranged for a meeting with the company on March 24, at the Depot, in Mr. Omar's office. At this meeting, the women were told they were laid off "under Code 12" and the testimony is in conflict as to whether they were told they were being laid off for the good of the company. When plaintiff asked Wirtz, at this meeting, why he did not protect them, he replied that the union got the job for them and it was up to the employees to keep it (24a), but he did not know what she could have done to keep the job (62a).

Following this meeting, plaintiff made several attempts to persuade the union to present and process a grievance in respect to her wrongful discharge, without success (25a-29a). She then presented her grievance, herself, to the company under the provisions of 29 U. S. C. A. 159 (a). Correspondence between the company and plaintiff's attorney on the subject elicited only a firm response that the company would not deal with anyone on the grievance other than the union (Exhibits 2 through 9) and all proceedings must take place between it and the company in accordance with the grievance section of the collective bargaining agreement (94a).

The company has stated, at all times, that it knew of no conduct on the part of plaintiff or the other four women which warranted discharge (73a; 88a). The union did not know of any reason why plaintiff should be discharged (61a). Mr. Hloros was unable to remember what the union did about checking the books after the discharges took place, to see if there had been an improvement (73a).

The plaintiff put in evidence of her damages. The company put in evidence in support of its claim of failure to mitigate damages. The plaintiff countered with testimony as to her efforts to obtain employment.

Plaintiff never authorized the union to waive any rights or settle any claims she had against defendant (66a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has exceeded its authority under the Seventh Amendment to the United States Constitution and has deprived petitioner of her right to trial by jury.
2. The Court of Appeals has decided a Federal question in conflict with the applicable decisions of this court.
3. The Court of Appeals has decided a matter of state law in conflict with the applicable decisions of the Supreme Court of the State of Michigan.

ARGUMENT

1. The Court of Appeals has exceeded its authority under the Seventh Amendment to the United States Constitution and has deprived petitioner of her right to trial by jury.

The Court of Appeals, at the very end of its opinion, states the issue in the case as being "whether, under the circumstances here involved, the Union had the authority, acting in the collective interest of those whom it represented, to agree with the defendant on necessary corrective measures to be taken without such action being treated as a breach of the collective bargaining agreement." At the outset, the Court of Appeals refers to its opinion on the first appeal for a complete statement of the facts and, referring to that opinion, we find that the Court of Appeals determined the circumstances involved were:

(a) The defendant was concerned about its cost experience on the counter operation where plaintiff worked;

(b) That a ratio of over 40 per cent of cost of food to sales indicated mishandling of merchandise and money by counter employees;

(c) Defendant was unable to ascertain which of, and how many of, its counter employees were guilty of the misconduct causing its bad experience;

(d) That the union and the company discussed the company's complaints for a period of several months prior to February, 1958;

(e) There was no proof directly connecting plaintiff, individually, with dishonesty, wrongdoing or malfeasance.

(f) There was no evidence from which a jury could find that, in agreeing to lay-off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the union's and defendant's agents.

It is clear that on the earlier trial of this cause, by returning a verdict of $5,000.00 in favor of the plaintiff, the jury must have made a different determination from that reached by the Court of Appeals. No mention is made of any errors of law with reference to instructions to the jury, or similar matters, and, as the Court of Appeals noted in its last opinion, "The basic facts, upon which we concluded that as a matter of law the plaintiff had no cause of action, are not in dispute."

It is petitioner's position that the Court of Appeals not only ignored the undisputed facts but misstated the facts in its opinion on the first appeal; that it refused to correct them when its attention was directed to the error on petition for rehearing; and again refused to correct them on the second appeal.

Taking first the Court of Appeals finding that defendant was unable to ascertain which of, and how many of, its counter employees were guilty of the misconduct causing its bad experience, we direct this court's attention to the following testimony by defendant's own restaurant managers on cross-examination:

"Q. Mr. Hloros, were you here when Mr. Wirtz testified that he suggested that you use a spotter to check the operation at the soda fountain?

A. Yes, I was.

Q. Do you recall a conversation with Mr. Wirtz on that subject?

A. No, I don't. I could have had.

Q. Could such spotters have detected mishandling of either food or cash?

A. Yes, they probably could have" (p. 71a).

"Q. Now, during the time that these girls were on vacation, did you hire somebody to replace them?

A. I can't say that. I can't remember who covered the vacations.

Q. Well, I'm not asking you who, I'm only asking if you brought somebody extra in to cover this shift?

A. I wouldn't say I did because we did have relief girls at the time. I can't say honestly who covered for their vacations. Whether I brought an outside girl or not.

Q. But you could have done so, could you not?

A. Yes, sure.

Q. And you could have brought a girl in with specific instructions to watch the operation and report any mishandling of cash or food, could you not?

A. Positively not. I didn't do it.

Q. But you could have?

A. Yes, I could have" (p. 72a).

• • •

Q. (To Mr. Omar): Now, if you issued so many hot dogs and so many buns —

A. Yes.

Q. — and you used sales checks —

A. We didn't use sale checks.

Q. But by using sales checks, you could account for those hot dogs?

A. Presumably if they were put on the check.

Q. But you could require your girls to make out checks if you were using them, couldn't you?

A. That's right.

Q. And when you issued 10 hot dogs, you had better get 10 checks back with 10 hot dogs on them, right?

A. Well, of course, they sometimes do it, got their limit. There might be one or two there.

Q. You can make them put it in a check for their lunch?

A. We could.

Q. So you could account for every one of them, can't you?

A. That's right.

Q. And within a narrow limit, you can account for all of the food that was sold, can't you?

A. That's right" (p. 84a-85a).

Next, it was conceded at all times, by both the union and the company, that the "bad operation" might not be due to any misconduct on the part of the counter employees. The union representative, Wirtz, testified that there were a great many factors that could account for an unfavorable ratio of food costs to sales, one being that anyone in the employ of the company could steal food (62a); the bookkeeper who received the money from the counter could have posted a false total for the amount of sales and pocketed the difference between that and the true amount (76a-78a). The dining room or restaurant, which constituted a separate bookkeeping operation, would borrow food from the soda fountain, without accounting for it (91a-92a). This was an ordinary company practice, but, obviously, it would inflate the cost of food charged to the soda fountain.

Finally, there was ample evidence from which the jury could have concluded either that there was; in fact, no "bad operation" or that the company had failed to prove one existed. The restaurant manager, Hloros, who first started complaining to the union about the operation, started work at the Michigan Central Depot around May of 1937 (34a). He did not know whether the desirable operating figure had ever been achieved at the Michigan Central Depot before he came (69a). The documentary evidence offered to prove that the operation was bad consisted of:

(a) Books in which were listed invoices from various suppliers (97a). The underlying invoices were never made available and, aside from the question of admissibility of such evidence in the absence of the underlying records, there was no way to ascertain

whether the variations in the ratio of costs to sales might have been due to variations in the unit price of the items purchased — for example, variations in the price of coffee per pound.

(b) Other books showing the sales reported, cost of merchandise less inventory, and inventory at the end of the month (98a). The sales reported figure was prepared from the cash register tapes, which were then thrown away, and there was no way of determining whether the totals were correctly transferred from the cash register tapes to this book (77a). Therefore, the total sales reported could be wrong and would be wrong if the bookkeeper was indulging in peculations. The inventory figure on this was a so-called "standing inventory" figure, by which the defendant meant they used the same figure for all months in between the dates on which actual physical inventories were taken (48a-50a). Thus, if the inventory were building up, the ratio of costs to sales would be reflected as unusually high. Even so, the actual physical inventories, although in the possession of the company, were never produced and, therefore, it was impossible to determine where the figure for the cost of food sold was correct, assuming that all other figures were correct. By the same token, if an inventory was built up and the company started using up inventory instead of purchasing, the cost of food sold to sales ratio would become much more favorable (70a; 83a-84a).

There was certain additional testimony by the defendant's managers to the effect that a change in the ratio of food costs to sales over a period of two weeks would not necessarily indicate an improvement in the efficiency or honesty of the counter operation and might reflect a change in the weather and nothing more (67a). The company claimed that all of its troubles originated at the large fountain (43a) but the records offered covered the purchases and sales at both the large and small fountain and some of the women laid off customarily worked at the

small fountain (44a). Finally their managers also testified that the restaurant operation was wholly satisfactory during the same period of time and that an acceptable ratio of food costs to sales for the restaurant operation was 38% to 41% (70a-71a). But, from March, 1957 through 1958, the cost of food to sales for the restaurant was over 41% for 14 of these 22 months, and over 44% for five of these months (96a). From these facts, the jury could well have decided the entire defense was a sham.

From the foregoing, it is clear that petitioner is not asking this Court to review conflicting claims or appraise the possible inferences that might be drawn from the facts. The two vital findings on which the Court of Appeals relied to justify the action of union in consenting to the discharge in violation of plaintiff's right not to be terminated without just cause (i.e. that the counter employees necessarily caused the bad showing and the company could not ascertain who was responsible) are admittedly and clearly contrary to all the evidence. For that matter, neither the company nor the union ever claimed that the company could not ascertain who was responsible for the bad operation, if there was one; only the Court of Appeals advanced this thought.

This being true, we simply have an employer who wishes to fire some employees but cannot do so without just cause under the collective bargaining agreement; and, with no justification for so doing, the union agrees that it will not process a grievance in their behalf or otherwise enforce the union contract — and the Court of Appeals holds it has no power to do so, and to bind the employees thereby, under its collective bargaining authority!

On the issue of good faith, the undisputed testimony showed that the union never discussed the company's complaints with the employees (57a) and did not insist that the company do so (58a). The union knew the company had not told the women the reason they were discharged (60a) and "wouldn't say for sure" that it had ever informed the discharged employees of the agreement with the company to lay them off for a trial period of two weeks, this layoff to ripen into discharge if the figures improved (62a). Plaintiff testified positively that she was not told of the reasons for the discharge (24a). The union repre-

sentative admitted that when the plaintiff asked him why she could not get any protection from him he told her "We get the job for you and it is entirely up to you to keep it" (24a; 62a) but he knew of nothing that plaintiff could have done to keep her job (62a). The union representative said that he knew that the company could determine the cause of its difficulties by the use of sales check or spotters (63a) and that the use of a standing inventory figure would distort the monthly ratio of cost of food to sales but made no inquiry about the extent of the inventory nor did he ask to see the inventory figures (58a). Further, Mr. Hloros indicated that the union never checked his figures after the firings to determine whether they had improved (73a) and the union never bothered to determine why the company chose the particular five that it did out of the ten for layoff (64a; 74a).

We recognize that the issue of good faith or arbitrary action on the part of a union sometimes rests upon inferences to be drawn by the jury from the facts, as a matter of law the union stands in a fiduciary relationship to the persons whom it represents and as collective bargaining agent owes them scrupulous good faith and candor. 2 *Am. Jur.*, Agency Sec. 252, p. 203. Further, it has been held that an agent has a duty of disclosure. As the Michigan Supreme Court said in *School District of Pontiac vs. Sachse*, 274 Mich. 345, 351:

> "The correct rule is stated in 1 *Mechem on Agency* (2d Ed.), Sec. 1207, with references, as follows:
>
> "'It is always the duty of an agent, * * * to fully inform the principal of all facts relating to the subject-matter of the agency which come to the knowledge of the agent, and which it is material for the principal to know for the protection of his interests. * * * But even where the agent is not personally interested in the contract, his duty to give the principal full information of all the material facts relating to the transaction, which are within his knowledge, still exists. * * *'"

It has also been said that:

"'There are certain well-defined duties and liabilities which the agent owes to the principal. The agent is a fiduciary and owes to his principal the duty of good faith and loyalty. The agent is under the duty to use care, skill, and diligence, and to obey the instructions of his principal.'" *Burton v. Burton*, 332 Mich. 326, 337.

"'A conscious and wilful neglect of duty, not prompted by any justifiable motive, must necessarily be committed in bad faith.'" *In re Hackett, Hoff & Thiermann*, 70 F. 2d 815, 817, C. A. 7. See also *Cornel v. Mason*, 268 P. 8, 12; 46 Ida. 712.

On the facts above stated, it follows as a matter of law that the union acted arbitrarily, and in bad faith.

The action of the Court of Appeals in re-examining the facts, reversing on the first appeal and remanding for a new trial, and then upholding the verdict directed solely on the basis of its previous opinion, comes within the orbit of conduct heretofore disapproved by this court in *Slocum vs. New York Life Insurance Co.*, 228 U. S. 364, 382, and *Baltimore & Carolina Line vs. Redman*, 55 S. Ct. 890, 295 U. S. 654, 657, 79 L. Ed. 1636.

In the latter case, this court said:

"The Seventh Amendment to the Constitution prescribes:

'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.'

"The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to

that end declares that 'no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.'

"The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the Court and issues of fact are to be determined by the jury under appropriate instructions by the Court."

We would also like to point out that there is a substantial question as to whether the trial court abdicated its function on the retrial of the cause by refusing to make an independent determination as to whether there was sufficient evidence to go to the jury.

At common law it was the duty of the trial court to determine in the first instance whether there was sufficient evidence to go to the jury. Under modern practice it does this by ruling on a motion for directed verdict or for judgment n.o.v. The District Court did so in the first trial of this cause. On the second trial, the District Court simply stated that, the evidence being substantially the same as that on the first trial, it must grant defendant's motion for directed verdict and refused to make an independent determination on the basis of testimony heard and witnesses observed. It is clear that the trial judge was proceeding under the doctrine of the law of the case — but the facts before the jury on the second trial, while substantially the same as goes on the first trial, *were not the facts found by the Court of Appeals.* In such a situation, we urge that the doctrine of the law of the case does not apply. We have found no authority on this subject but we do suggest such procedure comes perilously close to giving defendant not just ten days within which to make a motion for judgment n.o.v., or for a new trial, but approximately two years and, in addition, it permits a

usurpation of the function of the trial judge by the Court of Appeals. See *Cone vs. West Virginia Pulp & Paper Co.*, supra.

2. The Court of Appeals has decided a Federal question in conflict with the applicable decisions of this court.

The foregoing discussion has been on the theory that the union, as collective bargaining representative, in a proper case has the power to modify accrued rights of employees. In its opinion on the first appeal, the Court of Appeals indicates that this power has been recognized by this court in *Elgin, Joliet & Eastern Railway Co. vs. Burley*, 325 U. S. 711, 89 L. Ed. 1896. We respectfully urge that the Court of Appeals has misconceived the effect of its decision in the light of the Burley case. In the case before us, the union and the company agreed that employees could be discharged without just cause but, under Burley, any such agreement would be valid only insofar as it operated prospectively. While it is true that the union and the company agreed to the layoff before the layoff took place, nonetheless the discharge was predicated on events occurring prior to the so-called modification of the agreement.

This is completely at odds with the observation of this court that the collective bargaining powers of statutory bargaining agents does not extend to the changing of existing agreements with retroactive effects upon accrued rights or claims. *Elgin, Joliet & Eastern Railway Co. vs. Burley, supra*, pp. 739-40. Whatever might be said of the agreement if the company and the union had agreed that from February 15, 1957 on the company would be entitled to discharge at will in any month in which its ratio of cost of sales to sales exceeded 40%, this is not the situation that we have before us and the plaintiff's discharge without recourse violates all fundamental concepts of fair play.

Inferentially, at least, the Court of Appeals must be found to have held that such an agreement, operating retroactively, precluded any protest on the part of the employees affected either by way of grievance processing, under the rights bestowed by 29 *U. S. C. A.* 159(a) or by

way of civil suit. In support of this determination, it cited *Cortez vs. Ford Motor Co.*, 349 Mich. 108, to the effect that:

> "'Our Court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representatives of the Union, subject to challange after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud.'"

In citing this Michigan case, however, the Court of Appeals failed to note that the Cortez case is in many aspects contrary to the holding of this court in *Elgin, Joliet & Eastern Railway Co. vs. Burley, supra*, and the court also failed to indicate how the agreement of the union in the instant cause could possibly be in the interest of all its members or any of them; all this, of course; without getting into the question of whether the union did act in good faith and not arbitrarily.

3. The Court of Appeals has decided a matter of state law in conflict with the applicable decisions of the Supreme Court of the State of Michigan.

The Michigan Supreme Court has explicitly held that the reasons for discharge must be personal to the employee discharged. In other words, the fact that something is wrong somewhere is not sufficient unless it is shown the named employee is responsible. Want of diligence on the part of an employee may not be inferred merely because the business disappoints the employer's expectations. *Coon vs. Floyd Knox, Inc.*, 296 Mich. 305, 309. The words in a recent Michigan decision are directly applicable to plaintiff's case:

> "We can but conclude that the record obviously does not contain substantial, material and competent evidence of wrongdoing on the part of appellant. The most that could be said is that the record contains suspicions, insinuations, and unsubstantiated accusations. Any dismissal order based upon this record would

> offend not only the concepts of fair play, but shock the conscience of anyone who would take the time to read the record on which the order was based." *Dillon vs. Lapeer Training School*, 364 Mich. 1, 21-22.

This being so, we sumit that with the best intentions in the world the union was without the power to consent to the plaintiff's discharge without just cause and, in upholding its action in so doing, the Court of Appeals deprived the plaintiff of that protection to which she was entitled under the law of the state in which she resided and the defendant did business. When a union approves a discharge under circumstances which would compel the courts of Michigan to disapprove it, we think this does not prove the superior power or wisdom of the union but, on the contrary, is strongly indicative of bad faith and arbitrary action.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

DEE EDWARDS,
Attorney for Petitioner.

Dated: July 10, 1963.

OPINION OF THE COURT OF APPEALS
(Decided April 12, 1963)

Before: CECIL, Chief Judge, MILLER and O'SULLIVAN, Circuit Judges.

MILLER, Circuit Judge. The facts in this case are fully stated in *Union News Company vs. Hildreth*, 295 F. (2) 658, C. A. 6th. For our present purposes the following summary is considered sufficient.

The plaintiff was one of a crew of eleven or twelve persons employed by the defendant in its operation of a soda fountain and lunch counter at the Michigan Central Railroad terminal at Detroit. She was a member of the Hotel and Restaurant Employees and Bartenders International Union, AFL, Detroit Local Joint Executive Board, hereinafter referred to as the Union, which was the designated bargaining representative of defendant's employees. During the period of time here involved there was a collective bargaining agreement between the defendant and the Union, which contained the provision, "No regular employe covered by this Agreement shall be discharged except for just cause."

Defendant became concerned about its cost experience and poor operating results at the counter where plaintiff worked, which apparently resulted from mishandling of merchandise and money by unidentified employees. It discussed its problem with the Union and opened its books to the business agents of the Union, who made their own examination and analysis of defendant's continuing problem, and concluded that some action had to be taken to remedy the situation. After discussion between the defendant and the Union, a course of action was agreed to between them which was put into effect and ultimately lead to the permanent replacement of the plaintiff as an employee with the approval of the Union.

Plaintiff met with Union officers at the various levels of authority and with the Union's grievance committee in an effort to get the Union to take action against the defendant in her behalf. She was told that the Union was convinced

that her discharge was for just cause. No grievance was ever presented by the Union on plaintiff's behalf.

Plaintiff thereafter filed her individual complaint in this action alleging that she was discharged by the defendant without just cause in violation of the terms and conditions of the bargaining agreement between the defendant and the Union and seeking $30,000.00 in damages plus lost wages to the date of trial. A first trial of the case resulted in a verdict and judgment of no cause of action. A new trial was ordered, which resulted in a verdict and judgment in plaintiff's favor for $5,000.00. On appeal to this Court the judgment was reversed and a new trial ordered. *Union News Company vs. Hildreth*, supra, 295 F. (2) 658, C. A. 6th.

In reaching that conclusion we were of the opinion that under Section 159(a), Title 29, United States Code, the Union was the exclusive representative of all of the employees in the unit involved for the purposes of collective bargaining, and that such statutory power, in combination with the terms of the bargaining contract, authorized the Union and the defendant to mutually conclude, as a part of the bargaining process, that the circumstances shown by the evidence provided just cause for the layoff and discharge of the plaintiff and other of defendant's employees, and that plaintiff's discharge was not a breach of contract by the defendant. We also pointed out that there was no evidence from which a jury could find that in agreeing to lay off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the Union's and defendant's agents. The reasons for our conclusions were stated at length in the opinion, with the citation of supporting authorities.

On the new trial, the District Judge, relying upon the ruling and opinion of this Court, entered a directed verdict in favor of the defendant of no cause of action, which was followed by this appeal.

We find no merit in plaintiff's contention that evidence which was introduced at the last trial in addition to that introduced at the previous trial was sufficient to take the

case to the jury, even though the evidence introduced in the previous trial may not have been sufficient. We do not think there is any material difference in the evidence introduced at the two trials. The basic facts, upon which we concluded that as a matter of law the plaintiff had no cause of action, are not in dispute.

Plaintiff contends that in our previous ruling we gave no effect to the proviso in Section 159(a), Title 29, United States Code, to the effect that any individual employee shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative. It is pointed out that any reliance which we may have placed upon *Association of Westinghouse Salaried Employees vs. Westinghouse Corp.*, 348 U. S. 437, in making our ruling was not justified in view of the recent decision in *Smith vs. Evening News Association*, 371 U. S. 195, 199, on December 10, 1962, which held that the ruling in the *Westinghouse* case is no longer authoritative as a precedent.

We pass without comment so much of plaintiff's argument which challenges the correctness of our previous ruling, with the exception of the reference to a change in the applicable law by the recent decision of the Supreme Court in *Smith vs. Evening News Association*, supra. Subject to the effect of that case, if any, our previous ruling is the law of this case and will not be reconsidered on this second appeal. *Carpenter vs. Durell*, 90 F. (2) 57, 58, C. A. 6th, cert. denied, 302 U. S. 721; *Louisville Trust Co. vs. National Bank of Kentucky*, 102 F. (2) 137, 139, C. A. 6th, cert. denied, 308 U. S. 564.

The change in the law resulting from the ruling in *Smith vs. Evening News Association*, supra, in our opinion, does not affect our previous ruling. In making our ruling, we expressly stated (at p. 665) that we did not rely upon authorities which have held that under such a contract as here involved, only the Union can process a grievance and if a Union refuses or neglects to do so, an aggrieved employee is without remedy against his employer. The right of an individual employee to process an alleged grievance is not the issue in this case. Rather, it is whether,

under the circumstances here involved, the Union had the authority, acting in the collective interest of those whom it represented, to agree with the defendant on necessary corrective measures to be taken without such action being treated as a breach of the collective bargaining agreement. As stated above, we held such authority existed and was properly exercised.

The judgment is affirmed.

OPINION OF THE COURT OF APPEALS
(Decided October 2, 1961)

Before MILLER, Chief Judge, CECIL and O'SULLIVAN, Circuit Judges.

O'SULLIVAN, Circuit Judge. This is an appeal by defendant-appellant, Union News Company, from a judgment for $5,000.00 entered upon a jury verdict in favor of plaintiff-appellee, Gladys Hildreth. Her complaint charged that she had been discharged from defendant's employ without just cause, in breach of a collective bargaining agreement between defendant and the Hotel and Restaurant Employees and Bartenders International Union, AFL, Detroit Local Joint Executive Board, hereinafter referred to as the Union. Damages awarded included wages lost by plaintiff between her discharge and the time of trial and damages she claims she will suffer through loss of seniority as defendant's employee.

Defendant operated a soda fountain and lunch counter at the Michigan Central Railroad terminal at Detroit. Plaintiff was one of a crew of eleven or twelve persons employed at said counter. She had been employed at the Detroit terminal for about ten years, and was a member of the Union. During the period of plaintiff's employment, the Union was the designated exclusive bargaining representative of defendant's employees. The current agreement between the Union and defendant, dated October 15, 1957, was to run for one year with the usual provision for automatic yearly renewals unless terminated by either party.

Material and relevant to the issues on this appeal are the following paragraphs of the Collective Bargaining Agreement:

> "14. No regular employe covered by this Agreement shall be discharged except for just cause. In the event of a claim by the Union that an employe has been discharged without just cause, such claim must be filed with the manager of the unit within five (5) days and disposed of by him within five (5) days thereafter. If the matter cannot be satisfactorily adjusted between the Union and the employer's manager, the same shall be promptly referred to the employer's home office at 131 Varick Street, New York City.
>
> "15. Any and all questions and discussions which at any time may arise affecting the employes of the employer shall be taken up with the manager of the unit involved at such time and place as will be mutually agreed upon between the Union and the manager.
>
> • • •
>
> "17. During the term of this agreement, any question arising hereunder which cannot be directly and satisfactorily adjusted between the Union and the employer shall be referred to a Committee which shall consist of one member representing the Union, one representing the employer, and a third member to be mutually agreed upon by the employer and the Union, and the decision of any two (2) members of such Committee shall be final and binding upon the parties hereto."

On March 14, 1958, plaintiff was laid off by defendant. Her layoff matured into a discharge as discussed hereinafter. For a period of nine to twelve months prior to plaintiff's discharge, the manager of defendant's enterprise was concerned about its cost experience at the counter where plaintiff worked. There was evidence that in the type of business there being carried on, efficient and honest work by counter employees should result in food costs

being something less than 40% of the amount of gross sales; that a percentage of 35% to 37% in that regard is considered good; and that where the cost of merchandise reaches a figure above 40% of the amount of gross sales, it is indicative of a "poor operation" resulting from mishandling of merchandise and money by employees. Such mishandling could include dishonesty. From January, 1957, through February, 1958, this percentage was running rather uniformly above the 40% figure and was the cause of continuing discussions between defendant's manager and the Union. Defendant was unable to ascertain which of, and how many of, its counter employees were guilty of the misconduct causing its bad experience. Its manager suggested to the Union that the only solution was the replacement of all, or some of, the crew. The Union refused at first, suggesting less drastic measures such as talking to the girls and telling defendant's manager to "do the best you can and we will look into it further." Conditions did not improve, and in early 1958 defendant's manager opened its books to the business agents of the Union who made their own examination and analysis of defendant's continuing problem. In February, 1958, the food cost percentage was the highest, but one, of any of the preceding twelve months. Union representatives made their own analysis of the records of defendant and concluded that some action had to be taken to remedy the situation. Defendant's manager suggested that the entire crew on the soda and lunch counter be replaced. The Union representative felt that such action was too drastic and between the Union agent and defendant's manager, it was agreed that five of the counter employees be given a three day layoff and be replaced by new employees. There was then to be a trial period of ten days to two weeks to see whether such change of crew would bring about an improvement. It was agreed that if improvement came it would demonstrate that the laid off employees were, at least partially, the cause of the trouble. In such case, the laid off employees would not be rehired. It was further agreed that if conditions did not improve following the layoff, such experience would exculpate the laid off employees of fault and they would be rehired and paid the wages lost during the period of the

layoff. The laid off employees were replaced by other members of the Union. Following the replacement of the five employees, one of whom was the plaintiff, defendant's operation did improve and for the month of March the percentage of food costs to sales dropped from 43.46% for February to 39.90% for March and to 35.90% for April. This percentage remained below 40% for the entire balance of 1958, except for the month of August. In the week following the layoff, the cash receipts of the counter in question were $250.00 more than the final week with the old crew. After about ten days of the new operation, the Union agreed with defendant that it had proved its point and the replacement of the five employees became permanent. On the trial, plaintiff, to some extent, challenged the validity of the conclusions of the Union and defendant as to the significance of the food cost figures. However, there was no evidence of bad faith in the reliance of the Union and defendant upon such analysis.

After learning that she had been replaced, plaintiff took the matter up with her Union. On March 24th, a meeting was had at which the Union and defendant's representatives were present, as well as plaintiff and the other replaced employees. At this meeting, defendant's representative told plaintiff that she was laid off under Code No. 12, which meant "change of crew without prejudice." Such a termination of employment, the company representative said, would not disqualify plaintiff for unemployment compensation. When first laid off, she was told that it was for the good of the Union News Company, with mention being made of the bad condition at the fountain. She was told that the matter had already been cleared with the Union. Except for this meeting of March 24, plaintiff made no further contact with defendant until her attorney wrote a letter to it some months later. Plaintiff continued for a time to press for action by her Union. She was told that the Union was convinced that her discharge was for just cause. With the other discharged girls, she met with Union officers at the various levels of authority, and with the Union's grievance committee. This committee referred the matter to the Executive Board of the Union, and final

consideration of it was had at a meeting of the Executive Board in June following the discharge. Plaintiff was present at this meeting. No action was taken by the Board and no grievance was ever presented by the Union on Plaintiff's behalf.

Between May 6, 1958, and November 14, 1958, there was an exchange of correspondence between plaintiff's attorney, the Union News Company, and the latter's counsel. Plaintiff's attorney, on May 6, 1958, and on behalf of plaintiff and the other discharged employees, demanded that Union News Company "meet with us for the purpose of continuing the processing of the grievance in accordance with their rights under the law." This letter was unanswered and on May 31 the attorney advised the Union News that unless it set a time for a meeting, "with the above named persons and the writer, to process their grievances arising out of their wrongful discharge by you, legal action will be instituted to enforce their rights." This letter advised that a copy of it was being sent to the Union "in accordance with the provisions of Sec. 9 of the Taft-Hartley Act, to enable them to be present, but they will not participate in said grievance processing." In October, defendant's counsel advised that it was willing to proceed with grievance and arbitration proceedings as provided for in the bargaining agreement. Plaintiff's counsel, however, advised that, "It is the intention of the grievants to process their own grievances, as provided by the Taft-Hartley Act (29 U. S. C. A. § 159) assisted by myself." Nothing further was done in this regard.

On July 11, 1958, the complaint in this case was filed. Its prayer for relief asked:

> "A. That defendant may be ordered to meet with plaintiff for the purpose of processing her grievance out of her wrongful discharge, as provided by 29 U. S. C. A. Sec. 159.
>
> "B. That defendant, Union News Company, may be ordered to pay to plaintiff Thirty Thousand Dollars, plus the loss of her wages to the date of trial, as compensation for the damages suffered by her."

It concluded with a prayer for general relief. The remedy sought under above paragraph A was not pursued in the trial court and is not involved here.

Plaintiff's complaint averred, inter alia, that the Union Local 705 was her "statutory collective bargaining representative and agent"; that her cause of action was bottomed upon the Union's contract with defendant; that she was discharged on March 14, 1958, "without just cause in violation of the terms and conditions of said contract of employment"; that "plaintiff has made numerous and several attempts to invoke the remedies provided by the grievance procedure, including arbitration, but defendant Union News Company has wholly refused, failed and neglected to discuss said grievance with plaintiff's collective bargaining representative or to permit plaintiff to present her grievance to if as provided by 29 U. S. C. A. § 159, commonly known as the Taft-Hartley Act."

The defendant's answer, with amendment thereto, denied that plaintiff was discharged without cause; denied that it refused to discuss plaintiff's grievance or to permit her to present her grievance; and affirmatively averred that plaintiff was guilty of carelessness "amounting to dishonesty or malfeasance in the handling of funds and merchandise of the defendant, which resulted in financial loss to defendant" and that the discharge of plaintiff "was agreed and consented to by . . . Local 705. . . ."

A first trial of the cause resulted in a verdict and judgment of no cause of action. A new trial was ordered which ended in the judgment for plaintiff before us on this appeal.

Upon trial, plaintiff testified that after her discharge on March 14, 1958, she sought other employment but that she was "obviously pregnant at the time." Her only child was born on October 22, 1958, plaintiff then being 39 years old. She stated that she had planned to work until about September 1, 1958, and that she had expected to be off work for about six and one-half months, including time before and after her confinement; that had she retained her job with defendant, she would have had an aunt look after her child while she worked. Plaintiff testified to no efforts to seek work after the birth of her child. Objection

was sustained to defendant's effort to show that at the time of, and following, plaintiff's discharge, there was constant demand for the services of counter girls and waitresses in Detroit, and that the Union was regularly filling requests for such employment, but that plaintiff, although requested so to do, failed to go to the Union office for placement in another job. Defendant made such an offer of proof, supported by evidence upon a segregated record, after plaintiff's objection was sustained because defendant had not pleaded as an affirmative defense plaintiff's failure to mitigate her damages. The trial court denied defendant's motion (made following the sustaining of the foregoing objection) to amend its answer to include such an affirmative defense.

Before discussion of the legal questions involved, we should add that there was no proof directly connecting plaintiff, individually, with dishonesty, wrongdoing, or malfeasance. We further, preliminarily, observe that in our opinion there was no evidence from which a jury could find that in agreeing to lay off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the Union's and defendant's agents. We do not think that the inability of defendant to place individual responsibility for its difficulties on plaintiff impairs the validity of our conclusion in this regard, nor prevents the discharge of plaintiff and her fellow workers being "for just cause." An employer should not be foreclosed from applying a remedy to stop a continuing loss merely because it cannot identify and isolate the particular source, or sources, of such loss. We state also that what was done by the Union and defendant after plaintiff's discharge could not, in our opinion, be relied upon as evidence of fraud, bad faith or collusion in the prior mutual agreement to terminate plaintiff's employment.

Defendant's motion for a directed verdict at the close of plaintiff's evidence, renewed after proofs were closed, was denied. This ruling, with others, makes up the questions involved on this appeal. Because we are of the opinion that

defendant was entitled to a directed verdict of no cause of action, we do not reach other errors charged as ground for reversal.

It is our conclusion that, considering the statutory authority of the Union as the bargaining agent, the language of the collective bargaining agreement, and the undisputed facts as to the good faith bargaining between the Union and defendant, it was within the authority of the Union as bargaining agent to agree with defendant that there was just cause for plaintiff's discharge. Her discharge following, and pursuant to, such agreement was not a breach of contract by defendant.

Plaintiff is a resident of Michigan and was there employed by defendant. The collective bargaining contract was made in Michigan and the events here involved occurred there. Under like circumstances, we have held, that "the law of Michigan is important, if not, indeed, controlling." *Elder vs. New York Central Railroad Co.*, 152 F. (2) 361, 365 (C. A. 6, 1945). Under the law of Michigan, in accord with the weight of authority, an employer has the right to discharge an employee at will, unless such right is restricted or qualified by contract or statute. *Lucas vs. Maxwell Farms*, 279 Mich. 684; *Cortez vs. Ford Motor Company*, 349 Mich. 108; *United States Steel Corporation vs. Nichols*, 229 F. (2) 396, 399 (C. A. 6, 1956) cert. denied 351 U. S. 950 *N. L. R. B. vs. Standard Coil Products Co.*, 224 F. (2) 465, 470, (C. A. 1, 1955); 35 *Am. Jur.* "*Master and Servant*" § 34, p. 469. Plaintiff's right of action, if any, must arise from the terms of the contract between the Union and the employer. Not only the sentence of that contract which provides against discharge without cause, but all other relevant provisions of the contract and existing law, must be respected in determining whether, in this case, plaintiff has established a cause of action for breach of such contract. *Mastro Plastics Corp. vs. N. L. R. B.*, 350 U. S. 270, 279, 100 L. Ed. 309, 318. Michigan, again in accord with general law, holds that seniority rights, which for this purpose we equate with protection against discharge without cause, do not arise as an incident to employment, but exist only by virtue of contract. *Hartley vs. Brotherhood*, 283 Mich. 201, 206; *Ryan vs. New*

York Central Railroad Co., 267 Mich. 202, 208; *Cortez vs. Ford Motor Co.*, 349 Mich. 108, 112; *Elder vs. New York Central*, 152 F. (2) 361, 365 (C. A. 6, 1945). Whatever protection against discharge inured to plaintiff was the consequence of the *collective* action of plaintiff's Union. The Union, chosen as the statutory bargaining agent of plaintiff and defendant's other employees, is declared by statute to "be the exclusive representative(s) of all of the employees (in such unit) for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; . . . ." (Title 29, U. S. C. A. § 159[a].)

The question, then, for decision here is whether such statutory power, in combination with the terms of the bargaining contract, authorized the Union and defendant to mutually conclude, as a part of the bargaining process, that the circumstances shown by the evidence provided just cause for the layoff and discharge of plaintiff and other of defendant's employees. We conclude that it did. Unless such bilateral decisions, made in good faith, and after unhurried consideration between a Union and an employer, be sustained in court, the bargaining process is a mirage, without the efficacy contemplated by the philosophy of the law which makes its use compulsory.

Neither the right of a Union to bargain for its members nor the correlative duty of an employer to recognize and bargain with such agent ends upon the signing of a contract. "For the collective bargaining power is not exhausted by being once exercised, ..." *Elgin, Joliet and Eastern Railway Co. vs. Burley*, 325 U. S. 711, 739, 89 L. Ed. 1886, 1903. In this cited case, the majority of the Supreme Court held that a bargaining agent could not, through retroactive compromise, settle or wipe out a vested and already existing grievance or cause of action of an employee. Mr. Justice Rutledge was careful, however, to distinguish between the right of a Union to agree to prospective action and its power to dispose retroactively of existing grievances. "For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued, which marks the bound-

ary between collective bargaining and the settlement of grievances." The collective bargaining authority is likewise not limited to the negotiations which periodically precede the making of new or successive contracts. The employer is required to deal with the bargaining agent in between times concerning working conditions and the carrying out of existing contracts. In *National Labor Relations Board vs. J. H. Allison & Co.*, 165 F. (2) 766 (C. A. 6, 1948), we held that an employer's duty to consult with the bargaining agent continued between contract negotiations. We there quoted from *Order of Railroad Telegraphers vs. Railway Express Agency, Inc.*, 321 U. S. 342, 346, 347, 88 L. Ed. 788, 791, where Justice Jackson said, "Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit *to be consulted and to bargain* about the exceptional as well as the routine rates, rules and working conditions." In *Steele vs. L. & N. R. R. Co.*, 323 U. S. 192, 202, 89 L. Ed. 173, 183, dealing with the powers of one of the railroad brotherhoods under the Railway Labor Act, the Supreme Court said, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."

The National Labor Relations Board emphasizes the continuing duty of the employer to bargain concerning the administration of a contract, "It is now well settled that the statutory duty to bargain collectively does not close with the execution of the collective agreement. The employer is under the further duty to negotiate with the accredited bargaining agency concerning the modification, *interpretation and administration* of the *existing* agreement." *Carroll's Transfer Co.*, 56 N. L. R. B. 935, 937. ". . . the execution of a collective contract does not end the process of collective bargaining. . . . the *interpretation* and *administration* of a contract already made and the settlement of disputes arising under any such contract are properly regarded as within the sphere of collective bargaining." *Consolidated Aircraft Corp.*, 47 N. L. R. B. 694, 706. Professor Archibald Cox in his learned and comprehensive treatise "Rights Under a Labor Agreement" (69 Harvard

Law Review 601, 622) says, "It is also settled law that the Union's right to bargain and the employer's correlative duties are not limited to the negotiation of an agreement. Both the N. L. R. B. and the courts have consistently held that to refuse to discuss grievances and questions of contractual interpretation violates Section 8(a) (5)."

The *interpretation* of a contract by the parties thereto is not done as a matter of academic interest or in a vacuum. Interpretation is employed where there are facts to which such an interpretation is to be applied. Here the contract forbade discharge except for just cause. A condition arose which called for an interpretation of such clause. The employer disclosed to the Union the facts which the company felt would constitute just cause for the discharge of some of its employees. After an investigation and appraisal of such facts, the bargaining agent agreed that such facts constituted just cause. For our conclusion we do not rely upon the fact that, after plaintiff's discharge, the Union failed to present or process a grievance on her behalf, nor upon the then expressed opinion of its representatives that her discharge was for just cause. We are aware of the authorities which have held that the collective bargaining agent's authority does not extend to a retroactive determination that a discharge was for just cause or to the waiver or settlement of an existing grievance. *Elain, Joliet & Eastern Railway Co. vs. Burley*, 325 U. S. 711, 761, 89 L. Ed. 1886; *Woodward Iron Company vs. Ware, et al.*, 261 F. (2) 139 (C. A. 5, 1958); *In re Norwalk Tire and Rubber Co.*, 100 F. Supp. 706; and cases gathered in note in 18 A. L. R. (2) 352. Neither do we rely upon authorities which have held that under such a contract as the one here involved only the Union can process a grievance and if a Union refuses or neglects to do so, an aggrieved employee is without remedy against his employer.

We turn, then, to the specific terms of the contract in this case to see whether what was done here was within the power of the contracting parties. The first sentence of paragraph 14 contains the prohibition against discharge "except for just cause." The next sentence of the paragraph provides that "In the event of a claim *by the Union* that an employee has been discharged without just cause"

certain procedures are to follow. Nothing is said about a claim by the *employee* to the same effect. Paragraph 15 provides that "any and all questions and discussions which at any time may arise *affecting the employees* of the employer *shall* be taken up with the manager of the unit involved at such time and place as will be mutually agreed upon between *the Union* and the manager." The discussion between the representatives of the Union and defendant concerning the prospective layoff and discharge of some of defendant's employees was a matter "affecting the employees" and obeyed the command of such paragraph.

Paragraph 17 provides that "During the term of this agreement, *any question* arising hereunder which cannot be directly and satisfactorily adjusted between *the Union and the employer* shall be referred to a committee. . . ." Such committee is given authority to make a binding determination. It should be noted that the responsibility of implementing the contract's terms is, in each case, placed with the Union. Procedure to call into question a discharge is provided only in the event "of a claim *by the Union* that an employee has been discharged without just cause." We are impressed that a fair reading of these provisions discloses the contract's intent that the parties thereto had authority to do what was done here. The employer, in keeping with its duty to bargain on all matters, presented its problems to the Union. It did not act hastily or unilaterally. The Union, on behalf of its members, refused initially to permit the discharge of defendant's employees. It urged further and less drastic methods. Discussion of defendant's problems continued for many months with submission by defendant to the Union of data which defendant asserted demonstrated that some discharges had to be made. The Union made its own study of this material and concluded that action had to be taken. It refused, however, to allow the defendant to discharge all of the employees in the unit and suggested a layoff of half of them with their ultimate discharge if their replacement with new employees proved the company's point. The defendant acquiesced in the Union's suggestion and the layoffs and discharges were carried out in strict compliance with the programme agreed upon. We consider that the Union was acting in the

collective interest of those who by law and contract the Union was charged with protecting.

We think the case of *Cortez vs. Ford Motor Co.*, 349 Mich. 108, while not providing an exact analogy for our decision, is supportive of our conclusion. There a group of female employees sought damages for claimed illegal and discriminatory layoffs. The propriety of the layoffs was the subject of extensive negotiation between the company and the Union. Such negotiations, ended in an accord between them that the layoffs were proper although to some extent a departure from the strict seniority provisions of a collective bargaining agreement. It is apparent that the Union and management agreed in advance as to the matter of layoffs, but the Union did present grievances on plaintiffs' behalf to the employer's foreman for disposition. It did not press such grievances further. In affirming a dismissal of the plaintiff's declaration on motion, Mr. Justice Edwards said,

> "Our Court has repeatedly held that proper exercise of such discretion over grievances and *interpretation of contract terms* in the interest of all its members is vested in authorized representatives of the Union, subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud." (349 Mich. 108, at p. 121.

Justice Edwards quoted from *Ford Motor Co. vs. Huffman*, 345 U. S. 330, 337, where the Supreme Court made reference to the quality and extent of the collective bargaining agent's authority as follows:

> "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented."

In *Hartley vs. Brotherhood of Railway & Steamship Clerks, etc.*, 283 Mich. 201, 206, a female employee was laid off by her railroad employer contrary to her acquired

seniority. This was as a consequence of an agreement between the railroad and the Brotherhood (bargaining agent for the railroad employees) whereby married women were to be relieved from the service irrespective of seniority. The Supreme Court of Michigan held that it was within the power of the Brotherhood to modify the existing agreement, saying:

> "This agreement was executed for the benefit of all the members of the Brotherhood and not for the individual benefit of plaintiff. When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the Brotherhood, it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the railway to create the seniority rights of plaintiff and it likewise, by the same method, had the power to modify or destroy these rights in the interest of all the members."

We approved the holding of that case and the quoted language in *Elder vs. New York Central Railroad Co.*, 152 F. (2) 361, 365.

The fact that in the case at bar the agreement by the Union to permit defendant to discharge plaintiff and others was not reduced to a written agreement or memorandum does not detract from its legality.

Professor Cox reviews what has been decided by the courts to date on this subject (69 Harvard Law Review 601) and what that distinguished scholar considers desirable in labor contracts and in court construction of rights growing out of them. He says:

> "All this suggests that the bargaining rights of the majority representatives are as broad *in the administration of a collective agreement as in its negotiation.*" (p. 622)

> "In my judgment the interests of the individual will be better protected on the whole by first according

legal recognition to the group interest in contract administration and then strengthening the representative's awareness of its moral and legal obligations to represent all employees fairly than by excluding the union in favor of an individual cause of action. Consequently, I would lean toward finding such an intention in an ambiguous agreement." (p. 657)

We find no precise precedent for our decision, but believe it comports with legal principle and is consonant with the beneficial objectives of collective bargaining, now so important a tool in the continuing efforts to strengthen the position of the individual through collective action. Unless those upon whom is placed the responsibility for protecting collective interests are given the authority needed to discharge such responsibility, the entire process is of doubtful worth. Under the philosophy of collective responsibility an employer who bargains in good faith should be entitled to rely upon the promises and agreements of the Union representatives with whom he must deal under the compulsion of law and contract. The collective bargaining process should be carried on between parties who can mutually respect and rely upon the authority of each other.

The judgment of the district court is reversed with direction to enter judgment of no cause of action for defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 268

GLADYS HILDRETH,
Petitioner,
vs.
UNION NEWS COMPANY, a New York corporation,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

Petitioner's Appendix A, 4a to 18a, does not contain the full opinion of the Court of Appeals upon the first appeal, *Union News Company v. Gladys Hildreth*, reported in 295 F. 2d pages 658 to 667. Petitioner's appendix omits the last paragraph of that opinion, which reads as follows:

> "[9] No motion for judgment notwithstanding the verdict was made by the defendant-appellant

and this court is, therefore, limited upon reversal to granting of a new trial. *Cone v. West Virginia Pulp. & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752, 91 L.Ed. 849. The judgment of the district court is reversed and a new trial ordered."

QUESTIONS PRESENTED

Respondent does not believe that the questions presented by petitioner are relevant here and passes the same without comment except to say that the questions are suggestive of what should be regarded as an ineffectual attempt to bring about a rehearing or reversal of the first appeal to the Court of Appeals (docket No. 14224), reported in 295 F. 2d. 658.

Respondent believes that the questions presented here are as follows:

(1) Did the union, as petitioner's statutory bargaining representative, have the right to agree with respondent-employer that the layoff and discharge of petitioner-employee was for just cause and not in violation of the terms of the collective bargaining agreement?

(2) Where there is no material difference in the evidence introduced at the last two trials of this cause and the basic facts are not in dispute, did the Court of Appeals err in following its first opinion as the law of the case in passing upon the second appeal?

(3) Did the Court of Appeals err in adhering to its previous opinion and applying the law of the case in affirming the judgment of the District Court directing a verdict of no cause for action?

CONSTITUTIONAL PROVISIONS AND STATUTES

It is respondent's position that of the constitutional provisions and statutes cited by petitioner, only Section 9(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. 159(a) is material to the Court's consideration.

STATEMENT OF THE CASE

Counter-Statement of Facts

Respondent does not accept petitioner's statement because of inaccuracies and omissions therein.

Petitioner commenced suit on July 11, 1958, to recover damages for termination of her employment alleged to have been without just cause and in breach of the terms of a collective bargaining agreement dated the 15th day of October 1957, between respondent as employer and Hotel and Restaurant Employees Union, Local 705, as petitioner's statutory collective bargaining representative and agent. Further remedy sought by petitioner "that defendant may be ordered to meet with plaintiff for the purpose of processing her grievance out of her wrongful discharge as provided by 29 U.S.C.A. Sec. 159" was abandoned at a pre-trial hearing (stipulation filed January 4, 1960) and was not pursued in the second or third trials of this cause.

The first trial of this cause in the District Court in 1959 resulted in verdict and judgment of no cause for action. A new trial was ordered and held in 1960, which resulted

in verdict and judgment in favor of petitioner. Respondent appealed, and on October 2, 1961 (amended November 9, 1961), the Court of Appeals reversed the judgment of the lower court and ordered a new trial (Docket No. 1424, 295 F. 2d 658). New trial resulted after the conclusion of all the evidence in a directed verdict in favor of respondent of no cause for action. Judgment was entered accordingly on May 9, 1962 (21a-22a). Petitioner appealed on the theory that the District Court erred in following the prior opinion of the Court of Appeals and in granting defendant's motion for a directed verdict. The Court of Appeals affirmed the judgment of the lower court April 12, 1963 (Docket No. 15098, 315 F. 2d 548 (A, 1a-4a).

The facts in this case are fully stated in *Union News Company v. Hildreth*, 295 F. 2d 658, C.A. 6th, and are again summarized in *Hildreth v. Union News Company*, 315 F. 2d 548 C.A. 6th. Respondent relies upon the facts so stated and will only enlarge upon the same without intended repetition. In support of such facts, reference will be made to petitioner's appendix filed in Court of Appeals, Docket No. 15098, with page number preceding "a" and to respondent's appendix with page number preceding "b".

George Hlores, a seasoned employee of respondent, came to the soda fountain operation, which was entirely distinct from the restaurant operation at the Michigan Central Station, in the early spring of 1957. He issued continuous instructions to the employees at the counter and soda fountains, including petitioner, in writing and orally, in addition to posting prices of food, drinks and so forth for sale at the counter (32a, 43a, 5b). Principal among these instructions was that the counter girls should collect from the customer when served and ring up the amount of all sales immediately on their respective cash registers (32a, 5b).

there being two registers, one for each girl on a given shift. The counter girls were allowed to receive tips which were supposed to be placed in separate tip boxes (5b). Readings and tapes from each register were posted in permanent company records at the end of each shift (Form 291, Exhibits G, H, I, 40a, 41a).

Hleros, immediately after the assumption of his managerial duties, discovered that the operational figures pertaining to counter and soda fountain were bad. He testified that in the food industry such as this the food cost is the most important consideration (5b, 6b); that the percentage figures showed the ratio of the cost of merchandise only to the receipts from the sale of merchandise, and that no other items of expense, such as rent, utilities, payroll, and so forth were considered (33a, 6b). The same conception as to food costs and the basic importance thereof was expressed by Carl Omar, respondent's superintendent (21b) and also by Thomas Wirtz, business representative of Local 705 (15b).

There was accord as to the significance and meaning of the high percentage figures pertaining to the food costs at the counter and fountain operation. Hleros testified that percentage figures over 40% showed a bad operation and indicated mainly two things—mishandling of cash and mishandling of food (42a, 9b); that these figures were under discussion between him and Mr. Wirtz (9b). Mr. Wirtz, after testifying that in the lunch counter business food costs provided the only scale of operation, and that it was basic that food costs should be within a certain range (15b), went on to state that bad operational figures would indicate that food was going out the back door, was being given away, or would indicate a mishandling of funds (20b). Omar testified that the food costs indicated a bad

operation owing to the fact that they were running over 40% (21b).

Respondent was put off in its request to the Union for a change of crew (6b) until its operational figures for February, 1958 became available. These figures were disastrous—a percentage figure of 44% (7b). Hloros got the attention of the Union through Mr. Wirtz, who examined the books and records of respondent and agreed that something had to be done (7b, 16b). The Union refused a change of the entire soda fountain and counter crew (52a, 70a), but proposed that respondent lay off five, or one-half, of the counter and fountain employees after a three-day lay-off notice, and that if the figures did not improve after a period of ten days to two weeks, the laid-off employees would be reinstated with back pay, but that if the figures did improve, the defendant could keep the new crew (replacement to be supplied by the Union) and those employees who had been laid off would be regarded as permanently separated (31a, 35a, 54a, 61a, 17b).

Respondent agreed to the proposal of the union, and pursuant to agreement, gave lay-off notice to five fountain and counter girls, including plaintiff, on March 11, 1958. The girls were laid off on March 14th, and replacements were provided by local 705 (17b). Immediately following lay off, plaintiff, accompanied by the other laid-off employees, went to the offices of Local 705. They were there referred by Mr. Wirtz to his immediate superior, who arranged for a meeting to be held at the Michigan Central Terminal between the laid-off employees and representatives of the union and of respondent company. The meeting, as scheduled, was held in Mr. Omar's office on March 24, 1958, and was attended by union representatives, the laid off employees and Messrs. Hloros and Omar (55a, 60a, 81a).

There the employees were informed by Mr. Omar that they were being discharged for the good of the company under Code 12, which provided for a change of crew without prejudice so that if they were unable to find work elsewhere, they would have no trouble in getting unemployment compensation (22b, 23b). It was stated that the company rules had been violated, and that the operation was bad (23b). No claim was made at this meeting that the discharge of plaintiff and the other employees was without just cause (81a). Wirtz verified what Omar had said, and stated that he had examined the company books and figures, which disclosed a bad operation which meant that they (laid-off employees) would have to be changed (8b). Mr. Wirtz' version of this meeting was that Omar informed the girls that they were being discharged under a procedural code number for just cause (55a). He also testified that the girls had previously been called to the office by Messrs. Omar and Hloros and told that they were going to be replaced (58a).

Following March 14, 1958, counter and fountain sales and percentage figures showed marked improvement (Respondent's Exhibits E and F, 101a-104a).

Copies of existing records kept by respondent in the usual course of business were offered and received in evidence at all the trials. These showed (Form 292) weekly sales and cost of merchandise (33a, 9b, 26b, 27b). This form also showed percentage figures of foodcosts for given months. Defendant's Exhibits C and D are carbon copies of records of purchases of food and drink items for counter and soda fountains (Form 133) for period November 29, 1957, through June, 1958. Defendant's Exhibits G, H and I are copies of summary of register of readings (Form 291) which were transmitted from the original cash regis-

fer tapes to this permanent record, covering the period from December 19, 1957, to May 12, 1958. These records were kept by respondent company in form dictated by long experience and were kept in the usual course of business. Counsel for petitioner stipulated as of December 29, 1959, to the authenticity of all exhibits introduced at the pretrial, including letters and carbon copies of letters between defendant and plaintiff's counsel, and of defendant's books, records, transcripts therefrom and summary sheets, subject only to objections of respective parties as to relevancy, materiality and competency.

Respondent denies petitioner's statement (pg. 8) that it knew of no conduct on the part of plaintiff or the other four women which warranted discharge. It is true that no specific charges of individual dishonesty were directed at any of the individual employees who were laid off. Respondent has always maintained the position disclosed in its answer and amended answers (8a-10a) and its affirmative defenses as pleaded.

ARGUMENT

For purposes of respondent's argument only, we will accept petitioner's reasons for granting writ and proceed to meet her arguments thereunder.

I.

THE COURT OF APPEALS DID NOT EXCEED ITS AUTHORITY UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DID NOT DEPRIVE PETITIONER OF HER RIGHT TO JURY TRIAL.

Petitioner has had three trials of her alleged cause of action. The first trial resulted in verdict and judgment of no cause for action. The District Court granted a new trial because of an apparent omission in his charge. The second trial resulted in a verdict in favor of the plaintiff which may well be accounted for by the refusal of the District Court to grant certain requests to charge, and, more particularly, by its charge that,

> "The essential elements of the plaintiff's claim which she must establish by preponderance of the evidence in order to establish the element of liability in this case on the part of the defendant under the law applicable to that element is as follows:
>
> "(1) That the plaintiff requested the union to process her grievance;
>
> "(2) That the union refused to process plaintiff's grievance, and in so doing acted arbitrarily or in bad faith or in collusion with the defendant employer; and
>
> "(3) That plaintiff was discharged."

(Defendant-appellants appendix, Docket No. 14224, 253a).

The foregoing was substantially repeated, (254a). The Court of Appeals found it unnecessary to pass upon respondent's claim in the first appeal that the giving of the above charge to the jury was error (11a).

The affirmance by the Court of Appeals (A. 4a) of the judgment of the District Court in the third trial that the action be dismissed on the merits (22a) is the only basis for petition for writ of certiorari here.

Petitioner is still dissatisfied with her day in court. She still talks of speculative inferences and possibilities and now takes the position that the Court of Appeals not only ignored undisputed facts, but misstated the facts in its opinion on the first appeal. Respondent finds this an untenable position in which it refuses to concur in any respect. The Court of Appeals in its first opinion, 295 F. 2d 658 at page 663, said:

> "... in our opinion there was no evidence from which a jury could find that in agreeing to lay off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the Union's and defendant's agents. We do not think that the inability of defendant to place individual responsibility for its difficulties on plaintiff impairs the validity of our conclusion in this regard, nor prevents the discharge of plaintiff and her fellow workers being 'for just cause'. An employer should not be foreclosed from applying a remedy to stop a continuing loss merely because it cannot identify and isolate the particular source, or sources, of such loss."

It said further,

> "It is our conclusion that, considering the statutory authority of the Union as the bargaining agent, the language of the collective bargaining agreement, *and the undisputed facts as to the good faith bargaining between the Union and defendant*, it was within the authority of the Union as bargaining agent to agree with defendant that there was just cause for plaintiff's discharge." (Emphasis supplied.)

In connection with the foregoing conclusion, the Court of Appeals pointed out, page 665:

> "Here the contract forbade discharge except for just cause. A condition arose which called for an interpretation of such clause. *The employer disclosed to the Union the facts which the company felt would constitute just cause for the discharge of some of its employees. After an investigation and appraisal of such facts, the bargaining agent agreed that such facts constituted just cause.*" (Emphasis supplied.)

The Court of Appeals had in mind the basic facts disclosed to the union which the respondent company claimed would constitute just cause for discharge and not the possibilities and matters of conjecture and second guessing as to how respondent's business should be run which the petitioner has been able to conjure up in the last five years. The basic facts which the bargaining parties had in mind, concerning respondent's operation and supportive of their agreement are not disputed by petitioner. She says in her statement on page 5, "The evidence in this case is largely undisputed and such minor variations as exist are basically immaterial." She then recites respondent's complaint to the union, request for a change of crew, on the theory

that counter employees were either embezzling cash, failing to charge proper prices, particularly to friends, giving too large portions of food or otherwise mishandling food or money—which complaint as to a bad operation continued until the union made an investigation of respondent's books and ultimately that the union entered into an agreement with the company concerning the layoffs which culminated in discharge. She recites no incident where facts were misstated by the Court of Appeals.

There is therefore no basis whatever for petitioner's contention that the Court of Appeals misstated the facts in its opinion on the first appeal (page 10), nor for the statement (pg. 12) that it was conceded at all times by both the union and the company that the bad operation might not be due to any misconduct on the part of counter employees, nor for the contention (page 14) that the jury could have decided the entire defense was a sham. Certainly, there is no basis for petitioner's contention (page 16) that "It follows as a matter of law that the union acted arbitrarily and in bad faith." Petitioner never alleged any arbitrary action, bad faith or fraud on the part of the union or a failure to properly represent its membership, nor any collusion between the union and the respondent. Certainly, there was no testimony to indicate bad faith on the part of the union or collusion between union and the employer. Those are matters of insinuation and innuendo which permeated all of the trials of this cause, founded only on extravagant claims of petitioner as to what might have been and not upon what was done.

Returning to the claim that the Court of Appeals exceeded its authority in affirming judgment for a directed verdict, and that its conduct comes within the disapproval of this court in the light of *Slocum v. New York Life Insurance Company* and *Baltimore and Carolina Line v. Red-*

man, respondent is unable to see the application of those cases here. If anything, they are favorable to respondent's position. In *Galloway v. United States*, 319 U.S. 372, 87 L. Ed. 1458, where the Seventh Amendment to the Federal Constitution was held not to deprive the Federal Courts of the power to direct a verdict, it was said at page 389:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently this practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; *Berry v. United States*, 312 US 450, 85 L ed 945, 61 S.Ct 637. The objection therefore comes too late."

Rule 50 of the Federal Rules of Civil Procedure gives the right to Federal Courts to direct a verdict. Respondent will rely upon that right and also the finding of the District Court that:

> "The testimony submitted by both parties to this suit on this trial is substantially the same as the testimony submitted on the previous trial and the trial before that. All of the contentions made by the plaintiff in this case were considered by the Court of Appeals on appeal of judgment entered in the prior trial * * *" (16a).

and again

> "Therefore, on the evidence submitted on the prior trial, which I have already mentioned, is substantially the same as evidence submitted on this trial, and there has been no evidence here by counsel to point out wherein there is any difference with respect to the evidence" (17a).

II.

THE COURT OF APPEALS DID NOT DECIDE A FEDERAL QUESTION IN CONFLICT WITH THE DECISIONS OF THIS COURT.

It seems to be the contention of petitioner here that the union and company agreed that employees could be discharged without just cause. This was clearly not the agreement. The agreement was that petitioner and other employees could properly be discharged for just cause in accordance with the collective bargaining agreement under the existing circumstances. There was no modification of the collective bargaining agreement here. It was interpreted by the parties thereto in the light of the circumstances after a condition arose which called for their interpretation of the "just cause for discharge" clause in the absence of specific definition. The Court of Appeals in its first opinion found that it was within the authority of the union as bargaining agent to so agree with defendant.

In arriving at its decision, the Court of Appeals was careful to point out its awareness of the authorities which have held that the collective bargaining agent's authority does not extend to a retroactive determination that a discharge was for just cause or to the waiver or settlement of an existing grievance, citing *Elgin, Joliet & Western Railway Co. v. Burley*, 325 U.S. 711, 761, 89 L. Ed. 1886, and other cases.

Here there was nothing in the way of a retroactive determination of existing rights. Respondent comments only parenthetically that the Burley case was decided in the light of the rights of notice and appearance or representation given to railroad employees by the Railway Labor

Act of 1934, which rights were held to be separate and distinct from those which the collective agent may have had to represent the collective interests. Here, contra to claim by petitioner, there was no change of an existing agreement with retroactive effect upon accrued rights.

With reference to the matter of fair play and petitioner's question of how the agreement of the union in the instant case could possibly be in the interest of all its members, or any of them, respondent points to what it considers to be the unassailed integrity of the union in finally agreeing that an employer need not be deprived of its right to operate a business nor saddled permanently with a disastrous operation resulting from employee inefficieney or worse. Insistence by the Union that inefficient or dishonest employees could not be discharged for just cause might please the employees involved but would be unfair to other members of the union who may be presumed to possess requisite competency and efficieney for their work. It would not be conducive to good faith collective bargaining.

III.

THE COURT OF APPEALS DECIDED THE MATTER OF STATE LAW IN ACCORDANCE WITH THE LAW OF THIS STATE.

In Michigan, an employee has no inherent right to seniority or employment except as provided in contracts entered into and rules adopted by the employer relating thereto. *Ryan v. New York Central R.R. Co.*, 267 Mich. 202; *Hartley v. Brotherhood*, 283 Mich. 201; *Zdero v. Briggs Mfg. Co.*, 338 Mich. 549; *Holman v. Industrial Stamping and Mfg. Co.*, 334 Mich. 235; *Cortez v. Ford*

Motor Company, 349 Mich. 108; *Knight-Morley Corporation v. Employment Security Comm.*, 350 Mich. 397.

In Michigan, an employer has the right to discharge an employee at will unless such right is restricted or qualified by contract or statute. *Lynas v. Maxwell Farms*, 279 Mich. 684; *Cortez v. Ford Motor Company, supra.*

In *Cortez v. Ford Motor Co.*, 349 Mich. 108, which was an action against the Ford Motor Company, an international union and Ford Local No. 600 (UAW-CIO) and an individual who was the president of the Dearborn Stamping unit of Ford Local No. 600, the court said, at pages 120-121:

> "The essence of plaintiffs' complaint is really that the union failed to accept plaintiffs' position upon this grievance, namely, that each of them was, under the seniority provisions of the contract, entitled to a job at all of the times concerned, and failed to urge it upon the company through all the steps in the grievance procedure. There is no promise of this nature contained in the contract. On the contrary, the contract makes amply clear that union representatives have discretion to receive, pass upon and withdraw grievances presented by individual employees.
>
> "Our Court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representatives of the union, subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud. *Hartley v. Brotherhood of Clerks, supra; Zdero v. Briggs Manfg. Co., supra.* The United States Supreme Court has held the exercise of such discretion authorized by the labor management relations act of 1947 (29 USCA, Sec. 141 *et seq.*)" citing *Ford Motor Co. v. Huff-*

man, 345 U.S. 330, 337-339 (73 S. Ct. 681, 97 L. Ed. 1048).

Further in its opinion, the Court stated at pages 123-124:

"We do not believe under the pleadings and record currently before us that plaintiffs state a cause of action in assumpsit as third-party beneficiaries against the defendant International Union CIO, or Local 600 UAW-CIO, or Archie Acciacca."

"In this regard, we are mindful of the fact that individual members of the union may, under certain circumstances enforce fair and proper representation of their interests on the part of their union representatives by legal action. The union's duty of fair representation is founded upon the relationship between the union and the members as recited in the constitution and bylaws of the organization, *Ryan v. New York Central R. Co., supra; Harltey v. Brotherhood of Clerks, supra*, or in the duty imposed upon the union of fair representation by State or Federal labor statutes. *Steele v. Louisville & Nashville R. Co.*, 323 US 192 (65 S. Ct. 226, 89 L ed 173); *Brotherhood of Railroad Trainmen v. Howard*, 343 US 768 (72 S Ct 1022, 96 L ed 1283); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 US 232 (70 S Ct. 14, 94 L ed 22).

"No such case is before us. Since this count is founded entirely upon assumpsit, the cases which deal with the union's violation of its constitutional obligation to its members, or its obligation under the State and national labor acts, are not in point."

SUMMARY—CONCLUSION

Respondent respectfully prays that petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted.

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